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CASES CITED

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

JOSEPH SHERMAN,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Joseph Sherman petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit sustaining an order for petitioner's deportation.

OPINIONS BELOW

The opinion of the three-judge panel which first decided the case (R. 57a-70a; Appendix A, *infra*), holding that the deportation order should be set aside, is reported in 350 F.2d 894. The opinion of the court en banc affirm-

ing the deportation order on the government's petition for rehearing (R. 83a; Appendix B, *infra*) has not yet been reported.

JURISDICTION

The judgment of the court below (R. 85a; Appendix D, *infra*) is dated and was entered on January 17, 1966. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

In a deportation proceeding against a long-time resident alien, must the government prove the facts on which the deportability depends by more than a bare preponderance of the evidence?

STATUTES INVOLVED

§ 242(b) of the Immigration and Nationality Act, 8 U.S. Code § 1252(b), provides in part:

> "(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

§ 106(a)(4) of the Immigration and Nationality Act, as amended, 8 U.S. Code § 1105(a)(4), provides in part:

> ". . . the petition [for review of a deportation order] shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive."

STATEMENT OF THE CASE

Joseph Sherman, the petitioner, was born in Poland in 1906. In 1920, aged 14, he entered the United States in the company of his mother and three sisters and was admitted for permanent residence. (R. 58a.)

On March 14, 1963, the Immigration and Naturalization Service instituted deportation proceedings against petitioner, alleging that on December 20, 1938, he had reentered the United States without inspection and was therefore deportable under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S. Code § 1251(a)(2) (R. 1a).[1]

It was the Service's theory at the administrative hearing that petitioner had left the United States in June 1937, in order to fight on the loyalist side in the Spanish civil war, and had returned to the United States in December 1938, bearing a passport issued under the name of Samuel Levine (R. 1a-2a).

The Service introduced evidence that in June 1937, petitioner applied for and received a United States passport under the name of Samuel Levine. It was established that someone traveled to Europe on this passport in June 1937, aboard the SS Acquitania, and that someone entered the United States on this passport on December 20, 1938, aboard the SS Ausonia. There was no evidence identifying petitioner as the individual or individuals who had traveled on the passport. (R. 60a.)

The only evidence that petitioner had ever left the United States was the testimony of Edward Morrow, given in February and June 1964, twenty-seven years after the events to which it pertained (R. 3a; Tr.[2] 36-65, 77-103).

Morrow had served with the loyalist forces in Spain from about June of 1937 to about December 1938. He had left the United States in June 1937 aboard the SS Acquitania and had returned in December 1938 aboard the SS

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[1] The Order to Show Cause, which initiated the proceeding, is contained in the administrative record, which was not printed below (see 8 U.S. Code § 1105a(8)), and which has been filed with this Court.

[2] "Tr." refers to the transcript of the administrative proceeding.

Ausonia. In April 1963, an investigator for the Immigration and Naturalization Service showed Morrow the passport photograph (and its enlargement) of "Samuel Levine." Morrow told the investigator "that the person represented thereon appears vaguely familiar to him and believes he may have been on the 'Acquitania' sailing with him in June 1937. However, he could not recall anything specific regarding that person and could not further identify him. When asked if the name Joseph or Joe Sherman or Samuel or Sam Levine had any significance to him, or if a person bearing such name had been on the SS 'Acquitania' trip abroad in June 1937 or on the SS 'Ausonia' return voyage in December 1938, with him, he stated that he could not recognize the name. When furnished additional background data regarding the subject, he again advised that he could not tie it in with the person represented by the photograph." (R. 45a-46a, 3a.)

On February 25, 1964, just before testifying at the administrative evidentiary hearing, Morrow secretly observed petitioner for about half an hour. Morrow then testified that he had seen petitioner in Spain at least 20 times, that petitioner then had the name "Samuel Levine," and that petitioner had been on the SS Ausonia on his return voyage to the United States, but that he did not know whether petitioner had traveled to Spain with him. (R. 3a-4a, 10a.) Morrow also testified that he could not recall having had "any personal contact" with petitioner, that petitioner was not in his unit, that he could not identify any particular occasion on which he had seen petitioner, that he did not recall having been introduced to petitioner, and that he could not say how he knew that petitioner's name was "Levine." (R. 3a-4a, 10a, 13a, 15a, 20a-21a.) Morrow showed a failure of recollection concerning other events and persons in Spain, and his memory was extremely faulty even with regards to his interview in April 1963 with the Service investigator (R. 20a-25a, 29a). Morrow admitted that it was possible that his identification of petitioner was mistaken (R. 20a). When Morrow was asked,

"You are positive you saw this man in Spain?", he replied, "Positive - No. But I feel that I saw this man in Spain" (R. 21a).

The Special Inquiry Officer sustained the charge against petitioner and ordered his deportation. The Board of Immigration Appeals affirmed. (R. 60a.)

On review by the Second Circuit pursuant to 8 U.S. Code § 1105a, the case was first heard by a three-judge panel consisting of Circuit Judges Waterman, Friendly and Smith. On September 22, 1965, the panel, Judge Friendly dissenting, issued a decision setting aside the deportation order and remanding the case to the Immigration and Naturalization Service. (R. 57a-70a.) The majority held that in deportation cases *against long-time resident aliens only* the government has a "higher burden of persuasion" than the ordinary civil rule that "the party having the burden of proof need only prove the existence of facts on which he relies by a preponderance of evidence" (R. 64a). The majority ruled that the government's burden in such cases is to prove its case "beyond a reasonable doubt" (R. 66a-67a). The court stated, "It seems clear that due process requires that there be *some* test by which the fact finder can ascertain whether a fact does or does not exist in every legal proceeding" (R. 65a). The court considered irrelevant to this issue §§ 242(b) and 106(a)(4) of the Act, *supra*, p. 2, requiring that deportation orders be "based upon reasonable, substantial, and probative evidence," and, if so supported, to be "conclusive" (R. 62a-63a).

The court stated (R. 66a-67a):

> ". . . as to certain issues, courts have been free to conclude that it is fair and just to require a litigant in a civil action to carry a somewhat heavier burden of persuasion than litigants are required to bear as to the issues in most civil actions. . . . In some civil actions courts have even required that one party carry the burden usually borne by the prosecution in criminal proceedings. We have concluded

that the present case exemplifies a type of proceeding in which courts should require the Government to carry such a heavy burden. The petitioner entered the United States in 1920. The Government now seeks to deport him alleging that the petitioner left the country in 1937 and reentered without inspection in 1938. If the Government prevails, petitioner will be forcibly expelled from this country and returned to Poland which is in no meaningful sense his country now. We do not say that the Government should not be able to proceed against petitioner after so long a time. We do hold that the Government is required to establish that it is almost certainly true that petitioner entered the United States without inspection in 1938; in other words, the Government must prove beyond a reasonable doubt the facts upon which the deportation depends.

"We wish to stress that we do not hold this higher burden is imposed on the Government in all deportation cases. It is for the Board of Immigration Appeals to decide in the first instance when the rule we announce today relating to proceedings involving long-time resident aliens applies, and we wish to stress that the rule will not expand the scope of judicial review of agency determinations. The purpose of the rule is to impress upon the agency the grave nature of the task it performs. Although repeated attempts to redefine the term 'beyond a reasonable doubt' may simply 'aid the purposes of the tactician,' we are confident that the imposition of this requirement will have the salutary effect of causing the Board to proceed carefully in extreme cases such as the case now before this court. All we can require is that the special inquiry officer and the Board conscientiously ask whether the facts on which the deportation of a long-term resident alien depends are almost certainly true. If these administrators do so proceed the scope of review will remain limited to an inquiry whether the final order of deportation is supported by reasonable, substantial, and probative evidence on the record considered as a whole."

Judge Friendly, dissenting, stated (R. 68a):

"If the slate were clean, I might well agree that the standard of persuasion for deportation should

> be similar to that in denaturalization where the Supreme Court has insisted that the evidence must be 'clear, unequivocal, and convincing' and that the Government needs 'more than a bare preponderance of the evidence' to prevail."

Judge Friendly considered, however, that the rule announced by the majority was foreclosed by §§ 242(b) and 106(a)(4) of the Act.

The court ordered an en banc rehearing on the government's petition, and a majority voted to sustain the deportation order for the reasons stated in Judge Friendly's dissenting opinion. Judges Waterman and Smith dissented for the reasons stated in the majority opinion of the panel which had originally heard the case. (R. 83a.)

REASONS FOR ALLOWING THE WRIT

The issue in this case is whether, in deportation cases against long-time resident aliens, the government must prove the facts of deportability by something more than a bare preponderance of the evidence. Such a higher standard might be, as Judge Friendly suggested, the same as the judge-made rule in denaturalization cases, that the evidence must be "clear, unequivocal and convincing" and more than a "bare preponderance of the evidence." *Schneiderman v. United States*, 320 U.S. 118, 125; *Chaunt v. United States*, 364 U.S. 350, 353. Or, as Judges Waterman and Smith held, the rule might be as in criminal cases, that of proof "beyond a reasonable doubt."

The question is obviously of great importance to the administration of the deportation laws and to the rights and security of millions of resident aliens. That the question is substantial and far from settled appears from the opinion of Judges Waterman and Smith and even from the opinion of Judge Friendly, adopted by the majority of the en banc court.

Judge Friendly recognized that the denaturalization standard might well be correct in cases involving long-

time resident aliens "if the slate were clean" (R. 68a). He was wrong, however, in believing that Congress had conclusively written on the slate by providing in §§ 242 (b) and 106(a)(4) that deportation orders are valid only if "based upon reasonable, substantial, and probative evidence" and, if so supported, are "conclusive." These statutory provisions do not locate or define the burden of proof. If Judge Friendly's view were pushed to its logical conclusion, deportation orders supported by substantial evidence would be invulnerable on judicial review even if the Attorney General had placed on the alien the burden of proving that he was not deportable.

Furthermore, the provision that a deportation order is conclusive on judicial review if supported by substantial evidence is not much different than the standard of appellate review of the sufficiency of the evidence in criminal convictions. Yet it has never been thought that the appellate standard is inconsistent with the requirement that in criminal trials guilt must be proven beyond a reasonable doubt.

Finally, §§ 242(b) and 106(a)(4) require not merely that the evidence be "substantial," but also that it be "reasonable" and "probative." Considering the consequences of deportation to the alien and his family, the absence of a statute of limitations, and the number and nature of the grounds for deportation, "reasonable" evidence in a proceeding against a long-time resident alien can only be such as carries a high degree of certainty — evidence which produces a "solidity of proof." *Rowoldt v. Perfetto*, 355 U.S. 115, 120. Because deportation of a long-resident alien is an extreme disruption of personal liberty and human rights, it should be governed by a stricter rule than that which prevails in a routine suit for property damage or in a proceeding to expel a recent stowaway.

The facts here illustrate the need for a higher standard than a bare preponderance of the evidence in cases involving long-resident aliens. Petitioner entered this

country as a child. He has had his home here for 46 years. His family and roots are here. As Judge Waterman's opinion points out, he is being expelled to a land "which is in no meaningful sense his country now," and his banishment represents "a penalty that surpasses in its enormity many imposed by the criminal law." Petitioner has been exiled on a finding that he left the country to fight fascism in Spain and illegally reentered more than a quarter of a century ago. The case against him depends on an uncertain, belated identification by a witness testifying to casual observations of twenty-seven years before in a manner inconsistent with his prior statement to a Service investigator (see *supra*, pp. 4-5). It has elsewhere been remarked of testimony which proposed to go back for twenty years, that the witnesses "would be recalling something as in a dream, a kind of phantasmagoria, rather than an independent recollection." *United States v. Chase*, 135 F. Supp. 230, 233. See also *Nowak v. United States*, 356 U.S. 660, 667.

It may be that the dream-like testimony in this case constituted a "preponderance of the evidence," but it is shocking that it should be enough to uproot and exile this long-resident alien.

CONCLUSION

Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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